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Before the
FEDERAL COMMUNICATIONS COMMISSION JAN 19 1996
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Definition of Markets for Purposes of)
the Cable Television Mandatory)
Television Broadcast Signal Carriage)
Rules)

CS Docket No. 95-178

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To the Commission:)

COMMENTS OF COX COMMUNICATIONS, INC.

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January 19, 1996

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To the Commission:)

COMMENTS

Cox Communications, Inc. ("Cox"), by its attorneys, submits these Comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding.^{1/}

Introduction

Under Section 614 of the Communications Act and the Commission's rules, a commercial television broadcast station can assert mandatory carriage or "must carry" rights on cable systems that are located in the station's market.^{2/} The Commission's rules define a station's market to be the station's Area of Dominant Influence, or ADI, as determined by the Arbitron audience research organization and published in Arbitron's

¹ Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Notice of Proposed Rule Making, CS Docket No. 95-178 (December 8, 1995) [hereinafter "Notice"].

² 47 U.S.C.A. §534 (Supp. 1995); 47 C.F.R. §76.55(e) (1994).

Television ADI Market Guide,^{3/} as updated every three years to coincide with future must carry/retransmission consent election periods.^{4/} However, Arbitron has stopped publishing ADI designations, and thus there will be no revised ADI designations for future must carry/retransmission consent elections. Cox supports the Commission's view that the best approach is to continue to use Arbitron's 1991-92 Television ADI Market Guide to define market areas, subject to individual review and case-by-case refinement.^{5/}

Continued Use of the Arbitron 1991-92 Television ADI Market Guide Will Provide the Greatest Predictability and Stability

Continued use of the 1991-92 ADI designations is preferable to the other possible options^{6/} because it provides both the public and the broadcast and cable television industries with the greatest amount of predictability and stability in the application of the Commission's must carry rules. Television broadcast stations and cable system operators will be able to continue using a system on which they have already based their activities for the past two to three years. This approach is the

³ 47 C.F.R. §76.55(e).

⁴ 47 C.F.R. §§76.55(e), 76.64(f)(2).

⁵ Notice at ¶7.

⁶ The three options outlined in the Notice are (1) substituting Nielsen's "Designated Market Areas" (DMAs) for Arbitron's ADIs, (2) continue using Arbitron's 1991-92 ADI designations or (3) retaining the current market designations for the 1996 election and then switching to the Nielsen DMA system. Notice at ¶6.

most likely to ensure continuity of service to television audiences and orderly carriage of local stations.

Continued use of the 1991-92 ADI designations means that the definition of a station's market will not automatically be revised every three years. However, this should not be cause for concern; the boundaries of Arbitron ADI markets did not in fact greatly shift over time, and the designations thus tend to remain viable for extended periods. For example, when the 1991-92 Arbitron designations for 30 ADI markets (Cox randomly chose those alphabetically listed from Springfield-Decatur-Champaign, Ill. to Zanesville, Ohio) are compared with the 1981-82 Arbitron designations for the same 30 markets, the majority (23 out of 30) of the 1991-92 market designations either remained unchanged or only added or deleted one county from the 1981-82 ADI.^{7/} Ten years produced only slight changes. Thus, continued use of the 1991-92 ADI designations every three years will not likely affect the accuracy of a station's market definition.

Moreover, if a rare discrepancy were to arise between a market's evolving boundaries and the 1991-92 ADI designations, the Commission already has the power under Section 614(h) of the Communications Act to revise ADI designations.^{8/}

⁷ "Arbitron ADI Market Atlas" Broadcasting and Cablecasting Yearbook 1982, B-65 to B-75 (Broadcasting Publications, Inc. 1982); "Arbitron ADI Market Atlas" Broadcasting and Cable Market Place 1992, E-79 to E-93 (R.R. Bowker 1992).

⁸ 47 U.S.C.A. §534(h).

A Shift from the Arbitron ADI System to the Nielsen DMA System
Would Be Needlessly Disruptive Without Providing Added Benefits

Changing from Arbitron's ADI system to Nielsen's DMA system would be very disruptive. For instance, as the Commission notes,^{9/} a switch from one system to the other would raise questions about the applicability of both the numerous Commission decisions under §614(h) of the Communications Act^{10/} and §76.55(e)(3) of the Commission's rules,^{11/} and would affect broadcasters and cable operators that have established market relationships based on these decisions and the present ADI designations. During the last must carry/retransmission consent elections in 1993, many stations and systems signed retransmission consent agreements lasting substantially longer than three years. The stations and cable systems that negotiated for these longer-term retransmission consent agreements in 1993 reasonably assumed that a station's market definition would be unlikely to change much in the future. If the Commission were to switch to use of the Nielsen DMA to define stations' markets, the expectation of those parties that had negotiated longer-term retransmission consent agreements would in some cases be frustrated. Also, the change to the DMA designation may

⁹ Notice, at ¶7.

¹⁰ Section 614(h) of the Communications Act permits the Commission to revise a particular station's or community's market area. 47 U.S.C.A. §534(h).

¹¹ Section 76.55(e) of the Commission's rules provides for a "home county" exception to a station's ADI designation. 47 C.F.R. §76.55(e)(3).

discourage future efforts between stations and cable system operators to cooperate on lasting consent agreements due to concerns that the foundations on which the agreements are based may change again.

Switching from Arbitron's ADI system to Nielsen's DMA system would also disrupt the viewing patterns and expectations of cable subscribers. The public should not be subjected to the effects of carriage changes that are due to a shift to use of the DMA system to define stations' markets. By continuing to utilize Arbitron's 1991-92 Television ADI Market Guide, cable customers will not be subjected to needless channel changes and confusing channel realignments.

The shift to use of DMAs will even produce, in some situations, peculiar results completely unjustified under any stated rationale for the must carry rules. Cox's cable system in the Phoenix, Arizona area provides one example. Flagstaff, Arizona is not part of the Phoenix ADI but is part of the Phoenix DMA.^{12/} In anticipation of the shift to a DMA-based scheme, Flagstaff stations already have begun requesting carriage for the 1996 election period on Cox's Phoenix system. Flagstaff is approximately 120 miles from Phoenix, and the Flagstaff stations presumably cover issues of interest and concern to Flagstaff residents, rather than issues of interest to residents of the

¹² "Arbitron ADI Market Atlas" Broadcasting and Cable Market Place 1992, E-71 (R.R. Bowker 1992); "U.S. Television Station Index" Television and Cable Factbook, 63, A-60 (Warren Publishing, Inc. 1995).

city of Phoenix.^{13/} Carriage of the Flagstaff stations would harm rather than benefit Phoenix cable customers, as the addition of these stations may well require the cable system to drop cable programming. This needless change in channel line-up would only serve to confuse subscribers. The only beneficiaries of this shift in carriage requirements would be the Flagstaff stations, which might increase their advertising revenue; subscribers would face loss of existing programming choices and needless and confusing changes.

Any Shift from the Arbitron ADI System to the Nielsen DMA System
Would Greatly Affect Copyright Liability

A change from an ADI system to a DMA system will not only have an effect on the Commission's must carry rules, but also on the copyright liability incurred for carriage of broadcast signals. In a recent policy decision, the Copyright Office stated that for the 1996, 1997, and 1998 copyright royalty accounting periods it will use whatever market definition system is adopted by the Commission for the 1996 must carry election.^{14/}

If the Commission moves from an ADI scheme to a DMA scheme, many stations now treated as local (and hence free) for copyright purposes will become distant signals, the continued carriage of

¹³ Cox has not undertaken a comprehensive review of DMA boundaries, but in at least this case, the DMA is not drawn to support the concept of localism.

¹⁴ Copyright, Cable Compulsory License, 60 Fed. Reg. 65072, 65074 (Copyright Office 1995) (Notice of Policy Decision, Docket No. 95-8).

which will incur substantial copyright liability. Even if continued carriage of these stations (which today are sufficiently "local" to have must carry rights) is not compelled by Commission rules, their carriage will still be desirable. Systems should not be forced to choose between incurring substantial increases in copyright liability and eliminating local or regional television stations to which subscribers have become accustomed (and the carriage of which, until 1996, will have been required by the Commission).^{15/}

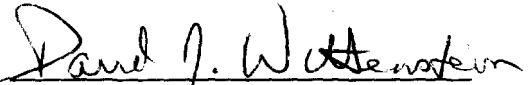
Conclusion

The Commission should continue to use Arbitron's 1991-92 Television ADI Market Guide to define television market areas for determining must carry requirements. The 1991-92 ADI designations remain a viable guide for market definitions and will continue to be so for the foreseeable future. Continued use of the 1991-92 ADI will cause the least amount of confusion and disruption for both the cable and broadcast industries and television audiences. The Commission has the power to correct individual situations that require modification, and the power to

¹⁵ While the Commission's rules would permit cable operators to pass through to subscribers the increase in programming costs due to the change in copyright liability, it cannot be desirable for cable subscribers to pay increased rates for the same programming already carried on their systems.

initiate a rule making in the future if the situation requires revisiting.

Respectfully Submitted,
COX COMMUNICATIONS, INC.

By 
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January 19, 1996

* Admitted in Maryland but not in the District of Columbia

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To the Commission:

AFFIDAVIT

I, James A. Hatcher, am Vice President, Legal and Regulatory
Affairs of Cox Communications, Inc.. I have read the foregoing
Comments and believe that they are true, complete and correct.

James A. Hatcher
Affiant

Subscribed and sworn to before me
this 18th day of January 1996.

Will R. Smith
Notary Public

Notary Public, Gwinnett County, Georgia
My Commission Expires March 15, 1999

My Commission expires: _____.